IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1341 OF 2006

Shri Barkatulla Ali Hasan Shaikh,
Age 43 years, Occ: Business,
Room No.20, Roshan Chawl, Kajupada,
Jarimari, Kurla-Andheri Road,
Mumbai-400 072. Petitioner
(Detenu)

vs.

1. Smt. Ranjana Sinha
Secretary (Preventive Detention) and
Detaining Authority, Government of
Maharahtra, Home Department,
Mantralaya, Mumbai.

2. The State of Maharashtra

3. The Superintendent,
Nasik Road Central Prison, Nasik.

4. The Secretary,
Advisory Board,
C/o.Section Officer, Desk SPL-X,
(Advisory Board), Home Department,
(Special), Mantralaya,
Mumbai 400 032. Respondents

Mr.Maqsood Khan with Mr.Sujay Kantawala for the petitioner.

Mrs.A.S.Pai, APP for the State.

CORAM : SMT.RANJANA DESAI &
ANOOP V. MOHTA,JJ.

DATED : 7th February, 2007

ORAL JUDGMENT (Per Smt.Ranjana Desai,J.).

The petitioner (detenu for convenience) is detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, 'COFEPOSA Act') under the order of detention dated 10th April, 2002 issued by the Secretary

(Preventive Detention) and Detaining Authority of the Government of Maharashtra (respondent 1 herein) with a view to preventing him in future from abetting the smuggling of goods and acting in a manner prejudicial to the conservation of foreign exchange. The order of detention along with the grounds of detention and material in support thereof was served on the detenu on 10th February 2006 and the detenu was detained. In the present petition there is a challenge to the said detention order.

2. The grounds of detention indicate that the Officers of DRI had received specific intelligence that a container bearing No.TPHU-8007901 is likely to contain imported cigarettes against declared goods i.e. Plastic Moulding Granules and that this container is destined for Aurangabad Inland Container Depot (ICD) and is likely to be diverted enroute to a prearranged godown in Navi Mumbai area where the imported cigarettes would be replaced with low priced plastic granules, as declared in the import documents. The officers kept surveillance for the said container in the night of 23.10.2001, on the Panvel Uran Highway. The grounds of detention further state that at about 2100 hrs. the officers spotted a truck bearing registration No.MH-04-AL-3012 parked outside National Hotel on the said highway. The suspect container bearing no.TPHU-8007901 was mounted, on the said truck. In the said truck, beside the driver

Shri. Sanjay Mane, three more persons i.e. Shri Avadesh Singh, cleaner of the said truck and Shri Dattatray Bankar, an employee of Shri Parvez Hasan and Shri Madhukar Khillare, a transport supervisor were found to be sitting. On enquiry by the officers, driver of the truck informed that the said truck would be taken by him to the godown premises situated near Turbhe Area, New Bombay, as per the directions of Shri Dattatraya Bankar and Shri Madhukar Khillare. Shri Dattatraya Bankar and Shri Madhukar Khillare stated that the truck is to be escorted by them to godown premises situated at D-209 MIDC, TTC area, HP Pipeline Road, Trubhe and both of them, volunteered to show the godown premises at Turbhe, to the officers. The said truck alongwith the container was thereafter escorted to the above said godown premises by the DRI Officers. Panchas were also called to witness the proceedings. In the said godown premises, two persons, viz. Shri Parvez Hasan and the detenu were also found. They were waiting for the arrival of abovementioned container for replacing the goods contained in the said container. For this, a large number of bags containing plastic granules was stored in the said godown. On enquiry, Shri. Parvez Hasan and the detenu admitted that the said container no.TPHU-8007901 actually contained cases of cigarettes, instead of plastic granules, as declared in the Import General Manifest (IGM) and Bill of Lading. Both Shri Parvez Hasan and the detenu admitted that the said

cigarette cases were to be unloaded from the said container in the godown premises and thereafter the container was to be restuffed with plastic granules as per description given in the Bill of Lading for onward transportation to ICD Aurangabad.

3. Further statements came to be recorded as indicated in the grounds of detention. On the basis of the same the Sponsoring Authority submitted the proposal to the detaining authority for issuing the order of detention against the detenu. Having perused the relevant material, the detaining authority was satisfied that the detenu had knowingly been involved in abetting the smuggling of goods and acting in a manner prejudicial to the conservation of foreign exchange. The detaining authority was further satisfied that unless detained the detenu was likely to continue to engage in similar prejudicial activities in future and therefore it was necessary to detain him under the said Act with a view to preventing him in future from abetting the smuggling of goods and acting in a manner prejudicial to the conservation of foreign exchange. In the circumstances, she issued the impugned order of detention.

4. Mr.Khan, the learned counsel appearing for the petitioner, has assailed the impugned order on several grounds. However, he pressed only one ground which, according to him, vitiates the detention order. Mr.Khan

submitted that the detenu had made a request for permitting his counsel to attend the Advisory Board meeting and represent his case. The detenu had submitted a letter dated 5th April 2006 to the Advisory Board making such a request. However, this request was not considered on its own merits. Relying on the judgment of the Supreme Court in **Nand Lal Bajaj v. State of Punjab & Anr., (1981) 4 SCC 327;** judgment of the Constitution Bench of the Supreme Court in **A. K. Roy v. Union of India, AIR 1982 SC 710** and the judgment of this Court in **Kakelwa Samuele Kongwa vs. Union of India & ors., 1985 CRI. L.J. 840**, he submitted that the impugned order of detention must be set aside.

5. Mrs.Pai, the learned APP, on the other hand, submitted that the request of the detenu to be allowed to be represented by a lawyer was considered by the Advisory Board and rejected. Representation made by the detenu against the order of detention was also considered by the Advisory Board. The Advisory Board gave a personal hearing to the detenu and therefore no prejudice is caused to the detenu. She submitted that there is no violation of the detenu's rights under Article 22(5) of the Constitution of India. Fair procedure was followed by the Advisory Board. The learned APP drew our attention to the affidavit of Madan Girju Sonde, Secretary, Advisory Board and contended that no discriminatory procedure was adopted by the

Advisory Board. In support of her submission, the learned APP relied on the judgment of the Supreme Court in **Suresh Bhojraj Chelani vs. State of Maharashtra, (1983) 1 SCC 382.**

6. We have given anxious consideration to the submissions advanced by the learned counsel. In our opinion, the submission of Mr.Khan is well founded and the continued detention of the detenu will have to be set aside on the ground canvassed by Mr.Khan. Admittedly on 5th April, 2006 Advisory Board's meeting was held and the detenu tendered a letter in which it was stated that he will not be able to explain his case as the case involves various law points which can only be explained by a legal practitioner. In the said letter the detenu further stated that his counsel was present to attend the Advisory Board meeting and it would be in the interest of natural justice and it would be fair and reasonable if he is permitted to be represented through his lawyer. The detenu prayed that his request may be considered sympathetically. Admittedly, no written reply has been given to the detenu rejecting his request. The hearing of the Advisory Board proceeded without the request of the petitioner being granted and hence it is being submitted that there is violation of the detenu's rights under Article 22(5) of the Constitution of India.

7. The legal position in this behalf is well settled. In **Nad Lal Bajaj case (supra)** the Supreme Court was dealing with detention order issued under the provisions of the Prevention of Blackmarketing & Maintenance of Supplies of Essential Commodities Act. On the facts before it the Supreme Court observed that while the Advisory Board disallowed the detenu's request for legal assistance it allowed the detaining authority to be represented by counsel. The Supreme Court commented that the Advisory Board blindly applied the provisions of sub-section (4) of Section 11 of the said Act (which denied the detenu the right to be represented by any legal practitioner before the Advisory Board) to the case of the detenu failing to appreciate that it could not allow legal assistance to the detaining authority & deny the same to the detenu. The Supreme Court made it clear that the Advisory Board is expected to act in a manner which is just and fair to both parties. The Supreme Court also found that the Advisory Board in that case had not perused the material on record. In the circumstances the continued detention was held to be illegal. The relevant observations of the Supreme Court may be quoted-

> "Arbitrariness is the very antithesis of Article 14. The principle of reasonableness is an essential element of equality and the procedure contemplated by Article 1 must answer the test of reasonableness in order to be in conformity with Article 14. The history of personal liberty is largely the history of procedural safeguards. The need for observance of procedural safeguards

> particularly in cases of deprivation of life and liberty is, therefore, of prime importance to the body politic. It is increasingly felt that in the context of "deprivation of life and liberty" under Article 21, the "procedure established by law" carries with it the inherent right to legal assistance. The right to be heard before the Advisory Board would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

8. In **A.K. Roy's case (supra)**, the Constitution Bench of the Supreme Court reiterated the same principle. The Supreme Court held that though the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board, if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Advisory Board through a legal practitioner.

9. In the case of **Kekelwa Samuele Kongwa (Supra)** similar contention was raised before the Division Bench of this Court. After considering similar argument this Court laid down the following propositions:

> (1) There is neither a constitutional right nor a legal right available to a detenu to be represented by a legal practitioner.
>
> (2) Where, however, the department is represented by a legal practitioner or a legal adviser, then the detenu cannot be denied the right to be similarly represented.
>
> (3) If the department is represented by an official before the Advisory Board to assist

the latter, then that official must be regarded as a legal adviser or a legal practitioner for the purpose of deciding whether the detenu is entitled to be represented by a legal practitioner.

(4) Though there is no constitutional or legal right available to a detenu to be represented by a legal practitioner, there is no legal bar to the detenu being so represented.

(5) A request may be made by the detenu for being represented by a legal practitioner and the Advisory Board may grant such a request.

(6) A request made by a detenu for being represented by a legal practitioner must be considered on merits and cannot be turned down on the ground (i) that the law does not give such a right to the detenu, or (ii) that it was the practice of the Board not to allow representation of a detenu by a legal practitioner.

(7) A detenu has a right to produce and examine witnesses before the Advisory Board in support of his case though the Advisory Board is under no obligation to summon such witnesses on the date fixed for the hearing of the detenu's case.

10. We will have to examine the present case in the light of the above judgments of the Supreme Court and this Court. It is pertinent to note that in the petition a specific contention is raised in ground 10(v) that Senior Officers of the Sponsoring Authority namely; Shri P.V. George, Deputy Director and Shri R. Swaminathan, Intelligence Officer appeared on the scheduled date and time of hearing before the Advisory Board. It is further stated that these officers assisted the Advisory Board on facts and law with a view to justifying detention order issued against the detenu and that the detenu was handicapped by the unequal

representation in quality as well as quantity, due to non-consideration of his specific request.

11. We find that Madan G. Sonde, Secretary, Advisory Board, has not dealt with this submission at all. There is no denial that Deputy Director Mr.P.V. George and Intelligence Officer Mr.R.Swaminathan were present. There is no denial that they assisted the Advisory Board on facts and law with a view to justifying the detention order issued against the detenu. In fact what is stated in paragraph 11 of the affidavit is that the officers of the Sponsoring Authority who were present pointed out material pertaining to the detenu against whom the detention order was issued. It was argued by the learned APP that the Advisory Board has not stated that these officers were present and they argued before the Advisory Board and in fact the officers were not heard. This assertion of the learned APP is wrong. We have carefully perused the Advisory Board's file. We have drawn the attention of the learned APP to the relevant part of the Advisory Board's file where it is stated that Mr.George and Mr.Swaminathan were present and the Advisory Board had heard them. This statement found in the file of the Advisory Board along with the assertion made in paragraph 11 of the affidavit of Madan G. Sonde, Secretary, Advisory Board persuades us to hold that these high officers were present before the Advisory Board; that they made submissions before the

Advisory Board and that the detenu was not allowed to be represented by a lawyer. Indeed this is a case where it can be said that the representation was unequal in quantity and quality. Besides Shri Sonde has in his affidavit quoted Section 8(e) of the COFEPOSA Act and stated that in view of the provisions of the COFEPOSA Act, the request of the detenu was considered and rejected by the Advisory Board. This affidavit is obviously filed ignoring the propositions laid down by the Division Bench of this Court in **Kekelwa Samuele Kongwa's case (supra)**. In that case this Court has clearly laid down that a request made by the detenu for being represented by a legal practitioner must be considered on merits and cannot be turned down on the ground that the law does not give such a right to the detenu. Besides, we find from the report that the request of the detenu is not considered on merits. The Advisory Board would be entitled to reject the request of the detenu but it must consider it on merits. In view of this serious infirmity the continued detention of the detenu will have to be set aside.

12. Mr.Khan, the learned counsel for the petitioner, however, contended that this Court will have to set aside the impugned order of detention. In this connection, the learned counsel relied on the unreported judgment of the Supreme Court in **Harshala Santosh Patil vs. State of Maharashtra & ors. in Writ Petition**

(Crl.) No.138/2006 dated 2.11.2006. We are not impressed by this submission.

13. In this connection, we may usefully refer to the judgement of the Supreme Court in **Meena Jayendra Thakur v. Union of India & ors., AIR 1999 SC 3517.** In that case the Supreme Court was dealing with a detention order issued under the COFEPOSA Act. It was argued before the Supreme Court that the authority making the declaration under Section 9(i) of the COFEPOSA Act has to indicate to the detenu that he has a right of representation to the detaining authority and the detenu not having been so informed the detention order gets vitiated. The Supreme Court negatived this submission. The Supreme Court held that if the detaining authority on the basis of materials before him did arrive at his satisfaction with regard to the necessity of passing an order of detention and the order is passed thereafter, the same cannot be held to be void because of a subsequent infraction of the detenu's right or because of non-compliance of the procedure prescribed under law. The Supreme Court clarified that on such infraction and for non-compliance of the procedure prescribed under law, the further detention becomes illegal, but it does not affect the validity of the order of detention issued under Section 3(i) of the COFEPOSA Act by the detaining authority.

. In our opinion, the ratio of this judgement would be attracted to the facts of the present case and hence it is only the continued detention of the detenu which can be said to be vitiated. This point was not argued before the Supreme Court in **Harshala Santosh Patil's case (supra)** We, therefore, reject this submission of Mr.Khan.

13. In the circumstances, we pass the following order:

(i) The continued detention of the detenu-Barkatulla Ali Hasan Sheikh under Detention Order dated 10.04.2002 passed by the Secretary (Preventive Detention), Government of Maharashtra, Home Department and Detaining Authority, Mumbai is quashed and set aside.

(ii) The detenu-Barkatulla Ali Hasan Sheikh is ordered to be released forthwith unless otherwise required in any other case.

14. The petition is disposed of.

[SMT.RANJANA DESAI,J.]

[ANOOP V. MOHTA,J.]